

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 10-0067

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANIEL FITZGERALD BROOKS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Ed McLean, Presiding

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STATEMENT OF THE ISSUE

After the Appellant's felony conviction for driving under the influence of alcohol (DUI), did the district court impose a legal sentence when it designated the Appellant a persistent felony offender based upon his prior conviction for attempted assault with a weapon, when the Appellant did not object to the notice and less than five years had lapsed between his prior felony conviction and the instant offense?

STATEMENT OF THE CASE AND FACTS

On October 7, 2007, the State filed an Information charging the Appellant, Daniel Fitzgerald Brooks (Brooks) with DUI, a felony, and the misdemeanor offenses of driving the wrong way on a one-way and failure to carry proof of liability insurance. (D.C. Doc. 3.) On October 11, 2007, the State filed notice of its intent to seek a persistent felony offender (PFO) designation at sentencing based upon Brooks' July 1, 2004 conviction for attempted assault with a weapon. (D.C. Docs. 7, 11.) Brooks did not object to the notice or challenge the validity of the prior felony conviction.

On February 11, 2008, a jury convicted Brooks of all three offenses. (D.C. Doc. 19.) On March 26, 2008, Adult Probation and Parole Officer Lisa Boyington filed a presentence investigation report (PSI) in which she listed Brooks' criminal

record. (D.C. Doc. 22.) On April 2, 2008, the district court designated Brooks as a PFO and sentenced him to 10 years in prison with five years suspended.

(D.C. Doc. 24.) The court further ordered that during the five-year suspended portion of the sentence, Brooks was committed to the Department of Corrections (DOC) for 13 months, during which he must be placed in the WATCH program. Upon successful completion of that program, the court ordered that the remainder of the 13-month commitment should be suspended. (D.C. Doc. 24.)

On May 22, 2008, Brooks filed a Notice of Appeal. (D.C. Doc. 26.) On November 11, 2008, this Court issued an Order dismissing the appeal based upon its independent examination of the record and conclusion pursuant to Anders v. California, 386 U.S. 738 (1967), an appeal would be wholly frivolous. (D.C. Doc. 32.)

On December 15, 2008, Brooks filed a pro se motion for clarification of his sentence in the district court. (D.C. Doc. 33.) In sum, Brooks argued that the DOC had concluded that the district court did not have authority to order Brooks' placement in the WATCH program, and thus, it did not intend to follow the mandates of the sentence. Brooks claimed that the DOC was thereby modifying his sentence which, in turn, extended his parole eligibility date. Brooks asked the district court to somehow intervene and make the DOC strictly follow the sentence that Brooks surmised the court intended to impose. (D.C. Doc. 33.)

The State responded to Brooks' motion by arguing that Brooks' parole eligibility date was within the sole discretion of the Montana Board of Pardons and Parole. It further acknowledged that the district court did not have statutory authority to order Brooks into treatment but could only recommend that the DOC place him into treatment. The State argued that the district court had no authority to give Brooks the relief he requested. (D.C. Doc. 34.)

The district court granted Brooks' motion for clarification because it concluded that it did not have authority to sentence Brooks to the WATCH program. (D.C. Doc. 36, attached as App. A.) The court amended the judgment as follows:

During the suspended portion of the Persistent felony sentence, Defendant Daniel Fitzgerald Brooks shall be committed to the Department of Corrections for a period of 13-months placement in an appropriate correctional facility. If the Defendant Brooks successfully completes a residential alcohol treatment program operated or approved by the Department of Corrections, the remainder of the 13-month sentence shall be served on probation.

Counts 1, 2 & 3 shall run consecutive to the Persistent felony offender sentence and concurrent to the five (5) year suspended sentence.

(App. A at 3.)

Following the district court's clarification of the judgment, Brooks filed a petition for writ of habeas corpus with this Court. On October 21, 2009, this Court entered an order remanding Brooks' case to the district court for a clarification of

the sentence and appointed the Office of the State Public Defender to represent Brooks on remand. (D.C. Doc. 39, attached as App. B.)

On remand, the district court conducted a hearing on December 2, 2009. (D.C. Doc. 43; 12/2/09 and 12/16/09 Transcript of Hearings [Tr.].) Brooks' counsel preliminarily informed the court that Brooks wanted the court to vacate the PFO designation and sentence him to a 13-month DOC commitment, followed by two years suspended, with credit for time served. (Tr. at 6.) Defense counsel also explained that the State had revoked Brooks' suspended sentence for the attempted assault with a weapon conviction, so Brooks was now serving time for that offense as well. (Tr. at 8.) For the first time, Brooks then alleged that he was challenging the 2004 Flathead County conviction because "there was uncounseled-critical stages in the prosecution in Flathead County." (Tr. at 9.)

On remand, the State argued that the PFO sentence should replace the sentence for the underlying conviction- -in this instance- -felony DUI. Thus, the State recommended that the court sentence Brooks as a PFO to ten years in prison with five suspended, and if the court wished, it could restrict Brooks' parole eligibility until he completed chemical dependency treatment. (Tr. at 10-11.) Brooks seemed to argue that such a sentence would be an ex post facto violation. (Tr. at 12.)

The court concluded that it would allow both parties to submit a sentencing memorandum before it reimposed Brooks' sentence. (Tr. at 14.) In its sentencing memorandum the State asserted that the court should sentence Brooks solely under the PFO statutes and not under the felony DUI statutes. (D.C. Doc. 44 at 3.) The State recommended that the court sentence Brooks, as a PFO, to ten years in prison with five years suspended. Further, if the court wished, it could restrict Brooks' parole eligibility until he completed chemical dependency treatment. (D.C. Doc. 44 at 4.)

In Brooks' sentencing memorandum, he argued that the court could not sentence him as a PFO, because he now asserted that his prior conviction for attempted assault with a weapon was constitutionally infirm based on his allegation that he was without counsel during critical stages of the prosecution. (D.C. Doc. 45 at 2.) Brooks pled guilty to this offense. (D.C. Doc. 22 at 3.) Brooks further argued that the court never should have granted his motion to clarify the sentence, because the court did not "clarify" the sentence in the manner Brooks wanted but, rather, modified the sentence in a manner that displeased him. (D.C. Doc. 45 at 3.)

Additionally, Brooks asserted that the district court should have sentenced him in accord with Mont. Code Ann. § 61-8-731, but because the court first sentenced him as a PFO and then sentenced him for the felony DUI to a 13-month DOC commitment to be served during the suspended portion of his PFO sentence,

the court violated his Fifth Amendment right, under the federal constitution, against multiple punishments for the same offense. (D.C. Doc. 45 at 4-5.) Brooks asked the court to dismiss the PFO “enhancement” and modify his DUI sentence to a 13-month DOC commitment followed by two years suspended. (D.C. Doc. 45 at 8.)

At the final hearing on December 16, 2009, after the court reviewed both parties’ sentencing memoranda, it concluded that it could either sentence Brooks under the PFO statute, or it could sentence him under the felony DUI sentencing statute, but it could not do both. (Tr. at 26.) The district court again designated Brooks as a PFO and sentenced him to ten years in prison with five years suspended. The court recommended that the DOC have Brooks complete the WATCH Program before he is paroled from prison. The court gave Brooks credit for the time he had already served, which amounted to approximately 22 months. (Tr. at 27-28; D.C. Doc. 54.) Brooks filed a notice of appeal. (D.C. Doc. 56.)

SUMMARY OF THE ARGUMENT

It is well settled that the PFO statutes, authorizing increased sentences for recidivists, do not violate double jeopardy because a sentence as a habitual criminal is not viewed as a new jeopardy. It is equally settled that a court can designate a defendant convicted of DUI as a PFO as long as the underlying charge

meets the definition of a felony and the State has provided proper notice of its intent to seek PFO status pursuant to § 46-13-108. Both requirements were satisfied here. When the district court sentenced Brooks for felony DUI, it correctly relied upon his 2004 conviction for attempted assault with a weapon to designate him as a PFO.

Brooks did not enter a timely objection to the State's PFO notice, nor did he in any manner contest the validity of his prior felony conviction at his original sentencing hearing. It was only through a post-sentencing, tangled procedure of Brooks' making, that he has now alleged that his prior felony conviction is constitutionally infirm because he was denied counsel at critical stages. Brooks pled guilty to the predicate felony of attempted assault with a weapon, and he cannot now use a post-sentencing hearing in the instant proceeding to make an untimely attack on his prior conviction. The district court properly designated Brooks as a PFO, and since Brooks did not timely object to the State's PFO notice, there was no need for the court to set a hearing on that issue prior to the imposition of sentence.

ARGUMENT

I. THE STANDARD OF REVIEW

This Court reviews a criminal sentence for legality only, to determine whether the sentence falls within statutory parameters. State v. Brendal, 2009 MT 236, ¶ 11, 351 Mont. 395, 213 P.3d 448, citing State v. Clark, 2008 MT 112, ¶ 8, 342 Mont. 461, 182 P.3d 62. Brooks argues that applying Montana’s PFO statutes to a felony DUI unconstitutionally violates the double jeopardy provisions of the United States and Montana Constitutions. In reviewing constitutional challenges to legislative enactments, “the constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt.” State v. Schults, 2006 MT 100, ¶ 25, 332 Mont. 130, 136 P.3d 507. The party raising the constitutional challenge bears the burden of proving the alleged infirmity. Id. Since resolution of the issue Brooks has raised on appeal involves a question of constitutional law, this court must determine whether the district court’s interpretation of the law is correct. Schults, ¶ 25, citing State v. Renee, 1999 MT 135, ¶ 21, 294 Mont. 527, 983 P.2d 893.

II. THE DISTRICT COURT PROPERLY DESIGNATED BROOKS AS A PFO AND IMPOSED A LEGAL SENTENCE

A. There Is No Double Jeopardy Violation

Brooks argues that, because this DUI was already enhanced to a felony based upon his prior DUI convictions, he cannot also be sentenced as PFO based upon his prior conviction for attempted assault with a weapon because both sentence “enhancements” are predicated on prior offenses.

The PFO statutes impose mandatory minimum sentences if the offender meets the PFO criteria and none of the exceptions enumerated in Mont. Code Ann. § 46-18-222 apply. Brendal, ¶ 20. In Brooks’ case, there is no dispute that his prior felony conviction for attempted assault with a weapon occurred within five years of his conviction in the instant case. Thus, Brooks meets the definition of a PFO.

This Court has previously held that the PFO statutes, which authorize enhanced sentences for recidivists, do not constitute double jeopardy because “[a] sentence as an habitual criminal is not viewed as a new jeopardy.” Shults, ¶ 26, quoting State v. Wardell, 2005 MT 252, ¶ 19, 329 Mont. 9, 122 P.3d 443. Further, Mont. Code Ann. § 46-18-502 makes no distinction between or among the types of felonies to which it applies, and it does not exclude offenders convicted of DUI violations. State v. Damon, 2005 MT 218, ¶ 36, 328 Mont. 276, 119 P.3d 1194,

citing State v. Yorek, 2002 MT 74, ¶ 18, 309 Mont. 238, 45 P.3d 872, overruled in part by Deshields v. State, 2006 MT 58, ¶ 9, 331 Mont. 329, 132 P.3d 540.

The circumstances of Brooks' case, being sentenced as a PFO on a felony DUI, is not, as Brooks argues, analogous to the circumstances in State v. Guillaume, 1999 MT 29, 293 Mont. 224, 975 P.2d 312, in which this Court concluded Guillaume's double jeopardy rights were violated when he was convicted for felony assault with a weapon **and** the district court then enhanced his sentence for using a weapon to commit the offense. Guillaume, ¶¶ 16, 17. In the instant case, Brooks' DUI was a felony based upon his three or more prior DUI convictions. Brooks met the definition of a PFO because in 2004 he pled guilty to felony attempted assault with a weapon and fewer than five years had lapsed between that conviction and the conviction in the instant case.

Since Brooks clearly meets the definition of a PFO, the maximum sentence the court could have imposed was 100 years. The court's sentence of ten years in prison with five years suspended was clearly within that statutory maximum. Further, on remand, the court made it clear that Brooks' sentence as a PFO replaced the sentence the court would have imposed for the felony DUI. (See Tr. at 25-26.)

Under Brooks' analysis, a person convicted of felony DUI could never be sentenced as a PFO. This Court has already determined that Mont. Code Ann.

§ 61-8-731 falls under the ambit of the PFO statute. Damon, 2005 MT 218, ¶ 37; Yorek, 2002 MT 74, ¶ 18; State v. Pettijohn, 2002 MT 75, ¶ 13, 309 MT 244, 45 P.3d 870. The district court properly sentenced Brooks as a PFO, and in so doing did not violate state or federal double jeopardy provisions.

B. Brooks Did Not Object to the PFO Notice or Contest the Validity of His Prior Felony Conviction for Attempted Assault With a Weapon.

Brooks next claims that the district court did not give him the opportunity, through a hearing, to challenge the validity of his prior conviction for attempted assault with a weapon, which is the prior felony conviction the State relied upon in its PFO notice. Thus, he asserts that he is now entitled to a hearing at which he could cast doubt on the validity of his prior felony conviction. Brooks, however, did not make a timely challenge to the validity of his prior felony conviction, and doing so would have been an uphill battle since he pled guilty to attempted assault with a weapon.

The State gave Brooks notice of its intent to seek a PFO designation on October 11, 2007. (D.C. Doc. 7.) The State repeated its intention in the omnibus hearing memorandum dated November 28, 2007. (D.C. Doc. 11 at 5.) Brooks never objected to the allegations contained in the notice. Thus, pursuant to Mont Code Ann. § 46-13-108(3), there was no reason for the district court to conduct a

hearing. State v. Gallagher, 2005 MT 336, ¶¶ 32-33, 330 Mont. 65, 125 P.3d 1141, citing State v. Minez, 2003 MT 344, ¶ 39, 318 Mont. 478, 82 P.3d 1.

Further, in the PSI, Officer Boyington listed Brooks' prior conviction for attempted assault with a weapon, dated July 1, 2004, in his criminal history. Brooks has not provided a transcript of the original sentencing hearing, but neither the district court minutes from the sentencing hearing nor the original judgment reflect that Brooks in any way raised a concern that his attempted assault with a weapon conviction was inaccurate or constitutionally infirm. (D.C. Docs. 23, 24.)

Moreover, when Brooks filed his motion for clarification of sentence, he did not allege that the district court had wrongly sentenced him as a PFO, because the predicate felony conviction was somehow invalid. (D.C. Doc. 33.) Rather, it was not until December 2, 2009, after Brooks filed a writ of habeas corpus with this Court, and this Court remanded the matter back to the district court for clarification, that Brooks alleged a constitutional infirmity with his prior conviction. (Tr. at 9.) In his December 10, 2009 memorandum, Brooks asserted that the district court did not properly designate him as a PFO because, in his prior felony case, he was without counsel during critical stages. (D.C. Doc. 45 at 2.)

In addition to Brooks' failure to make a timely challenge to the accuracy of his prior felony conviction, Brooks pled guilty to the prior felony of attempted assault with a weapon. Thus, even assuming there was any validity to his claim of

being without counsel during critical stages of the prior proceeding, he waived that claim by pleading guilty. It is well settled that a defendant waives his right to appeal all nonjurisdictional defects upon voluntarily and knowingly entering a guilty plea, including claims of constitutional violations which may have occurred prior to the plea. State v. Violette, 2009 MT 19, ¶ 16, 349 Mont. 81, 201 P.3d 804, citing Hagan v. State, 265 Mont. 31, 35, 873 P.2d 1385, 1387 (1994). Thus, he cannot now allege for the first time in a post-sentencing proceeding that his prior conviction, to which he pled guilty, was constitutionally infirm and cannot be the basis for a PFO designation.

Since Brooks did not make a timely challenge to the accuracy of the PFO notice, and since the PFO designation request was based upon a felony offense to which Brooks pled guilty, the district court had no reason to provide Brooks a hearing to challenge the validity of his prior conviction approximately five years after the fact.

CONCLUSION

The district court correctly designated Brooks as a PFO and for his instant conviction for felony DUI, properly sentenced Brooks to ten years in prison with five years suspended. The State respectfully requests that this Court affirm the judgment.

Respectfully submitted this 24th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

TAMMY K PLUBELL

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APPENDIX

D.C. Doc. 36, Opinion and Order, filed January 24, 2009 App. A

D.C. Doc. 39, Order, filed October 21, 2009.....App. B